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Nos. 452 and 569

In the Supreme Court of the United States

OCTOBER TERM, 1929

RICHBOURG MOTOR COMPANY, INTERVENOR, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

DAVIES MOTORS, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the District Court in No. 452. The *per curiam* opinion of the Circuit Court of Appeals (R. 15) is reported in 34 F. (2d) 38.

In No. 569 no opinion was rendered by the District Court. Its findings of fact and conclusions of law will be found in the Record, pp. 26–30. The opinion of the Circuit Court of Appeals (R. 52) is reported in 35 F. (2d) 928.

JURISDICTION

In No. 452 the judgment of the Circuit Court of Appeals was entered July 22, 1929. (R. 16.) The petition for certiorari was filed October 21, 1929, and was granted December 2, 1929. (R. 17.)

In No. 569 the decree of the Circuit Court of Appeals was entered November 12, 1929. (R. 61.) The petition for certiorari was filed January 13, 1930. On February 24, 1930, the petition was granted and the case assigned with No. 452 for argument as one case. (R. 63.)

The petitions for certiorari were applied for and granted under the provisions of Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Where an automobile is seized while being used in the transportation of intoxicating liquor in violation of the National Prohibition Act and there has been no conviction therefor under that Act, may forfeiture proceedings be maintained under Section 3450, Revised States (U. S. C., Title 26, Sec. 1181), for use of the car to evade Internal Revenue taxes on the liquor, or does Section 26, Title II, of the National Prohibition Act (U. S. C.,

Title 27, Sec. 40) afford the exclusive remedy for the disposition of the car? In other words, where transportation is involved, are Sections 26 and 3450 in direct conflict so that the former to the extent of such conflict, repeals the latter?

A second question involved is whether the action of the arresting officer in bringing the occupants of the vehicle before a United States Commissioner and charging them with possession and transportation of liquor, in violation of the National Prohibition Act, is an election binding upon the Government to proceed only under that statute, or whether the United States Attorney, upon learning of the arrest, may drop the proceeding under the Prohibition Act and proceed for the forfeiture of the vehicle under Section 3450, Revised Statutes (U. S. C. Title 26, Sec. 1181).

STATUTES INVOLVED

The statutes involved are set forth in an appendix to this brief, pp. 33–38, *infra*.

STATEMENT

No. 452, Richbourg Motor Company

The automobile in this case was seized by a Federal Prohibition Agent while it was being driven along the public highway by a Mrs. Bryson in company with two other persons. It was found to contain twelve and one-eighth gallons of moonshine whiskey on which the tax had not been paid. The officer testified: "I knew Mrs. Bryson, the girl in

the car, and was suspicious of the car. I saw it going down the road and watched for it as it came back. Then I saw it coming back up the road and stopped the car on the main highway and made an investigation and found this liquor in the car." The officer took possession of the car and arrested the occupants, whom he took before a United States Commissioner, where they were charged with transportation and possession of whiskey in violation of the National Prohibition Act. The United States Attorney did not proceed with this charge, but secured an indictment against the occupants of the car under Section 3296, Revised Statutes (U. S. C., Title 26, Sec. 404), for removing and concealing spirits on which the tax was not paid (R. 5–6), and filed a libel in the District Court for the Western District of North Carolina against the car seeking its forfeiture under Section 3450, Revised Statutes, because it had been used in the removal and for the deposit and concealment of the whiskey in question with intent to defraud the United States of the tax thereon. (R. 1–2.)

The petitioner, the Richbourg Motor Company, intervened in the libel proceedings, claiming the car as an innocent holder of an unsatisfied purchase-money lien thereon for $417, petitioner having sold the car under a conditional sales contract to a Mrs. Hunnicutt who, it appears, had loaned the car to one of the occupants thereof at the time of its seizure. (R. 2–4.)

At the close of all the evidence, the intervenor, Richbourg Motor Company, moved to dismiss the libel on the ground, among others, that the United States had elected to proceed under the National Prohibition Act and was barred from proceeding under Section 3450, Revised Statutes, and on the further ground that, since the prohibition officer had discovered persons in the act of transporting intoxicating liquor, the National Prohibition Act made it mandatory to proceed under that Act. The motion was overruled by the trial court. (R. 7.)

The intervenor then tendered the following issue: "Was the Ford coupe, Motor No. 4,444,150, actually engaged in transporting liquor and were persons in the car and arrested at the time of the seizure of said car?" The court declined to submit this issue to the jury because it was "not raised by the pleadings in the case for the determination of the law question involved." (R 7–8.)

The court declared there was but one issue, which it submitted to the jury, namely, "Was the Ford Coupe Motor No. 14,444,150 engaged in removing and concealing untaxpaid liquor as alleged in the libel?" (R. 5, 8.) This issue was answered in the affirmative. (R. 5, 8.)

The court thereupon gave judgment for the forfeiture to the United States of the bond for $350 theretofore given by the Richbourg Motor Company for the release to it of the automobile in question. (R. 8–10.) On appeal to the Circuit

Court of Appeals the judgment was affirmed in a *per curiam* opinion (R. 15–17), and certiorari was granted by this Court.

No. 560, Davies Motors, Inc.

The facts in this case are substantially the same as those in No. 452. The case arose by a seizure by a Federal prohibition agent of an automobile used in the illegal transportation of liquor and an arrest of the person in charge thereof for transportation and possession in violation of the National Prohibition Act upon a complaint filed before a United States Commissioner. (R. 18–19, 20–23, 26–28.) No further proceedings appear to have been taken under that Act. Subsequently, an information was filed charging the person in possession of the car and the liquor with a violation of the criminal provisions of Section 3450, Revised Statutes, to which he pleaded guilty and was fined. (R. 23, 28.) A libel against the car seeking its forfeiture under Section 3450, Revised Statutes, was filed on the ground that it had been used in the deposit and concealment of distilled spirits with intent to defraud the Government of the taxes thereon. (R. 3.) The petitioner, Davies Motors, Inc., intervened in these proceedings, claiming title to the car under a contract of conditional sale. (R. 7.)

Upon its findings of fact and conclusions of law the District Court decreed the automobile forfeited to the United States. (R. 30–32.) In affirming the

decree of forfeiture the court below reviewed the decisions of the Circuit Court of Appeals for the Fourth Circuit in No. 452 and other cases in that Circuit upholding forfeitures under Section 3450 upon a similar state of facts, as well as the decision of the Circuit Court of Appeals for the Fifth Circuit in *United States* v. *General Motors Acceptance Corporation*, 25 F. (2d) 238, where the opposite conclusion was reached, and followed the decisions and line of reasoning of the Circuit Court of Appeals for the Fourth Circuit. (R. 52–61.) Upon application of the petitioner certiorari was granted by this Court.

SUMMARY OF ARGUMENT

Section 26 of the National Prohibition Act is not mandatory in the sense that proceedings under it are compulsory, and therefore exclusive, in the case of a car seized while used in violation of the provisions of Section 3450 of the Revised Statutes.

While Section 26 protects innocent interests, Congress did not intend by its enactment to extend such protection to property subject to forfeiture under Section 3450, or any other statute, merely because transportation of liquor happens to be an element common to the cause of forfeiture under the respective statutes. When acts complained of give rise to causes of forfeiture under two statutes, authority is complete to proceed under either unless the later statute is for the same offense or is otherwise so far inconsistent with the earlier as im-

pliedly to repeal it. Sections 26 and 3450 do not deal with the same offenses. Intent to defraud the United States of its revenues characterizes the latter but is not essential to the former; and the mere fact that transportation (removal) of liquor is an element common to both does not make them the same. Identity of offense therefore can not support the implication of repeal. Nor are the sections "directly in conflict." (Willis-Campbell Act, c. 134, Sec. 5, 42 Stat. 222, 223; U. S. C. Title 27, Sec. 3.) Variation of legal consequence dependent on intent is sufficient to remove all suggestion of conflict or inconsistency.

But it is argued that Section 26 provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title," and that consequently once a case is made presenting facts sufficient to warrant proceedings under Section 26 there can be no proceedings under any other law. To construe this provision either as mandatory or exclusive would lead to the most extraordinary results by extending immunity to all offenses under Federal statutes in the course of the commission of which there is transportation of liquor. If there has been no repeal of Section 3450, and if the language of Section 26 is neither mandatory nor exclusive, then we contend that there was no election binding upon the United States to proceed only under Section 26 in these cases.

ARGUMENT

I

SECTION 26 OF THE NATIONAL PROHIBITION ACT IS NOT MANDATORY IN THE SENSE THAT PROCEEDINGS UNDER IT ARE COMPULSORY AND EXCLUSIVE WHERE TRANSPORTATION IS INVOLVED, AND THERE IS NO CONFLICT BETWEEN IT AND SECTION 3450, REVISED STATUTES

In *United States* v. *One Ford Coupe*, 272 U. S. 321, it was held, where transportation was not involved, that Section 3450, Revised Statutes, could be applied to forfeit a vehicle used as a place of concealment and deposit of intoxicating liquor for the purpose of evading an internal-revenue tax. In *Port Gardner Investment Company* v. *United States*, 272 U. S. 564, it was held that where transportation was involved and there had been a conviction therefor under the National Prohibition Act, disposition of the car under Section 26 of that Act became mandatory, and resort to proceedings under Section 3450 was precluded. In *Commercial Credit Co.* v. *United States*, 276 U. S. 226, it was held that where there was a conviction of unlawful possession of intoxicating liquor, which possession was incidental to the transportation, the vehicle must be disposed of under Section 26. None of these cases decided the question here involved, namely, whether forfeiture proceedings must be brought under Section 26 where transportation is involved but there has been no conviction under the National Prohibition Act.

In the instant cases the cars were seized while being used in the transportation of liquor, but there was no conviction under the National Prohibition Act. While the arresting officers charged the drivers and occupants of the cars with transportation and possession in violation of that Act, the respective District Attorneys, not feeling themselves bound by the action of the arresting officers, elected to proceed against the occupants of the cars and the cars themselves under the internal revenue laws, with the result that the cars and the innocent claimants' interests were forfeited. This proceeding was approved by both District Judges and both Circuit Courts of Appeals, which declared in effect that, where there has been no election to prosecute the guilty parties under the National Prohibition Act, the Government may proceed under Section 3450, and that against such proceedings the rights of an innocent lien claimant will not prevail.

Petitioners contend that these decisions are erroneous for the reasons that, where transportation is involved, Section 3450, Revised Statutes, is in direct conflict with Section 26 of the National Prohibition Act and was not reenacted by Section 5 of the Willis-Campbell Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), and that in such cases the provisions of Section 26 are mandatory and the Government has no right of election to forfeit the car under any other statute.

The Government contends that there is no such conflict between Section 3450, Revised Statutes, and the National Prohibition Act as to render it mandatory upon the Government officers to proceed under the latter Act, where the facts of the offense constitute also a violation of the former statute. The evidence found by the officers at the time of the arrests and seizures in these cases rendered the defendants liable to prosecution under Section 3296, Revised Statutes, and the criminal provisions of Section 3450, Revised Statutes, and the automobiles subject to libel and forfeiture under Section 3450. These propositions are predicated on the theory that these two sections of the revenue laws were in force and effect at the time the offenses were committed and that they are not in conflict with the provisions of the National Prohibition Act. If, as petitioners contend, there is such direct conflict, then the Government should have proceeded under the latter Act. On the other hand, if there is no such direct conflict, then the Government submits it had the right to choose either remedy.

The sole basis of petitioners' contention of conflict and of the decisions relied on by them is that Section 26 saves the interests of the innocent lienor or owner from the forfeiture required by Section 3450. We submit that this is not sufficient to show a conflict in all cases of transportation. If a case otherwise comes within the provisions of Section 3450, a conflict does not necessarily result merely

because transportation is also involved which, in a proper case brought under Section 26, would save the innocent interests. The interest of an innocent owner or lienor in property used to transport liquor may be forfeited. See *Van Oster* v. *Kansas*, 272 U. S. 465. As in that case, petitioners here entrusted their property to a wrongdoer. The Court there points out (p. 467) that it is not uncommon for the law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. The Court also refers to the cases of *United States* v. *One Buick Roadster Automobile*, 244 Fed. 961, and *United States* v. *One Seven-Passenger Paige Car*, 259 Fed. 641, where the innocent interests of lienholders in automobiles used to introduce liquor into the Indian Territory in violation of Section 2140, Revised Statutes, were forfeited. There would appear to be nothing unusual, therefore, about the forfeiture of innocent interests in transportation cases. While it is true that Section 26 protects innocent interests in proceedings brought under it in a proper case, Congress may well have intended that such interests should not be saved in a case properly falling within Section 3450 or some other statute, merely because transportation is also involved. In fact, this Court, in *United States* v. *One Ford Coupe, supra*, pointed out that Section 26 does not protect innocent interests generally, but applies only to cases of forfeiture incident to the

prosecution as therein provided. The Court said (pp. 332–333):

> The claimant contends that Section 26 has modified Section 3450, as applied to intoxicating liquors, so as to deny a forfeiture of the interest in the vehicle of one who had no guilty knowledge that it was to be used for an illegal purpose. That there was no such protection of the innocent interest prior to the National Prohibition Act is conceded. *Goldsmith, Jr.-Grant Co.* v. *United States,* 254 U. S. 505. That since the Willis-Campbell Act, Congress has not intended to restrict any remedy theretofore given in aid of the revenue laws is clear. *The argument that by Section 26 Congress manifested the intention to protect generally innocent interests is unfounded.* The section is narrow in scope. The protection accorded is stated explicitly. It does not apply generally to violations of the Prohibition Act, *nor to the violation of any provision of the revenue laws.* It applies solely to *cases of forfeiture incident to the prosecution, as therein provided,* of a person transporting liquor by a vehicle in violation of the Prohibition Act. (Italics ours.)

After the passage of the National Prohibition Act considerable doubt prevailed as to whether the Act superseded the old internal revenue laws relating to taxation of distilled spirits. The question finally reached this Court in *United States* v. *Yuginovich,* 256 U. S. 450, where it was held that

the new Act had the effect of repealing certain provisions of those laws. This decision was rendered June 1, 1921. On November 23, 1921, Congress, with manifest intention of counteracting the effect of this decision (*United States* v. *Stafoff*, 260 U. S. 477), adopted an Act supplemental to the National Prohibition Act, known as the Willis-Campbell Act, Section 5 of which provides, in part:

> That all laws in regard to the manufacture and *taxation of* and *traffic in* intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and *continue in force*, as to both beverage and nonbeverage liquor, except such provisions of such laws as are *directly in conflict* with any provision of the National Prohibition Act or of this Act; *but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.* (Italics ours.)

It would seem to be clear from the latter part of this section, as above quoted, that Congress recognized the fact that cases might arise, like those at bar, where the facts would constitute a violation of the revenue laws as well as of the National Prohibition Act; that in such cases prosecution might be had under either statute, but that a prosecution under one statute should bar a prosecution under the other. The language of this statute itself would

seem to suggest the implied authority on the part of the Government to exercise the right of electing under which statute it will proceed, when the facts of the offense constitute a violation of both.

Section 3296, Revised Statutes, under which the Government proceeded in case No. 452, makes it unlawful for any person to remove or conceal distilled spirits on which the tax has not been paid. Section 3450, under which the defendant in No. 569 was prosecuted, makes it unlawful for any person to remove, deposit, or conceal any goods or commodities for or in respect of which any tax is imposed, where the act of removal, deposit or concealment is committed with intent to defraud the Government of the tax thereon, and it also provides for the forfeiture of vehicles and other instrumentalities used in such removal, deposit, or concealment. A tax is still due on distilled spirits, whether legally or illegally manufactured. *One Ford Coupe case, supra.* The effect of petitioners' contention is that since the automobiles in question were engaged in removing liquor at or just prior to their seizure, the offense was one of transportation under the National Prohibition Act rather than removal, deposit or concealment under Section 3450, and that therefore the defendants should have been prosecuted under the National Prohibition Act and the automobiles forfeited under Section 26. We submit that if the liquor in the automobiles had been tax-paid there would be some basis for this contention, as

there would then have been no violation of Section 3450. Consequently, Section 26 would have been the only law applicable and proceedings would have had to be brought thereunder. Section 3450 is not in direct conflict with Section 26 where distilled spirits are removed, deposited or concealed by means of an automobile with intent to defraud, even though transportation is involved in such transaction. The two sections cover different offenses and have different purposes. Section 3450 strikes at the removal, deposit and concealment of a particular kind or class of liquor, namely, tax-unpaid distilled spirits where there is an intent to defraud the Government of the tax. Two elements are necessary to be established to prove a violation of this section which are not necessary to be established under Section 26, namely, (a) the removal, deposit or concealment of tax-unpaid distilled spirits and (b) an intent to defraud the Government. Section 26 applies to the illegal possession and transportation of all intoxicating liquor, whether tax-paid or tax-unpaid, but it does not cover the element of intent to defraud which is denounced by Section 3450. Intent to defraud is an offense separate and distinct from any offense denounced by Section 26. Other distinguishing features showing the different purpose and scope of the two sections are enumerated in the *One Ford Coupe case* (pp. 330–331):

> The two statutes cover different ground. Different purposes underlay their enactment. Section 3450, extending to every taxed article, seeks to enforce the obligation to pay the tax by subjecting to forfeiture also articles used in the attempt to evade such payment. The purpose of Section 26 is to prevent the manufacture, sale or transportation of intoxicating liquor. *Carroll* v. *United States,* 267 U. S. 132, 154–155, 157. It is true that many acts punishable under Section 3450 are punishable also under Section 26. But many are not. Thus Section 3450 applies to a vehicle, whether used for removal, deposit or concealment, and even although the vehicle is not in motion and movement was never contemplated; Section 26 applies only to a vehicle used in transporting contrary to law. Section 3450 may apply although a permit was obtained to transport the liquor; Section 26 cannot. On the other hand Section 3450, as applied to liquor, relates only to that on which taxes have not been paid; Section 26 applies whether taxes have been paid or not. *It is clear that the mere existence of two provisions penalizing acts which are part of the same transaction does not prove direct conflict between them.* Nor does the difference in purpose which underlay their enactment. (Italics ours.)

In the *Ford Coupe case, supra,* there was advanced almost every conceivable argument why Section 3450 should not be applied to the facts in that

case. The Court answered all these arguments fully and completely, saying (p. 331):

> To establish an implied repeal there must, under the legislative mandate, be shown some necessary contradiction so extreme as to justify this Court in finding it impossible to permit the Government the choice between the two remedies where the facts bring the offense within the provisions of both statutes.

Also, with respect to the remedies afforded by Sections 3450 and 26 (p. 332):

> It is clearly possible to apply to a particular state of facts either one or the other remedy, and to give the Government the choice.

The fact that the automobiles in which the liquor was removed, deposited and concealed were in motion and engaged in transportation at or about the time of seizure has, we submit, no significant bearing upon the question of violation of Section 3450. Where an automobile is in motion, the element of removal is combined with the elements of deposit and concealment. Where the automobile is not in motion, the elements of deposit and concealment are sufficient to constitute violation of this section. In *Port Gardner Company* v. *United States,* 272 U. S. 564, and *Commercial Credit Co.* v. *United States,* 276 U. S. 226, the automobiles were in motion, and transported or contained liquor incidental to transportation at the time of seizure. This Court held that the cars could not be forfeited un-

der Section 3450. But it seems that the Court did not so hold because of a direct conflict between Sections 3450 and 26, but because those in charge of the cars had been prosecuted and convicted under the National Prohibition Act. In the *Commercial Credit Company case* the Court, with respect to its decision in the *Port Gardner case,* said (p. 231):

> In answering one of the questions presented by the certificate we held that the "prosecution with effect" of the driver of a car under the National Prohibition Act constituted "an election by the Government to proceed under Section 26 of that Act," and thereby prevented the forfeiture of the car under Section 3450. As to this we said: "The disposition of the automobile prescribed in Section 26 became mandatory after" the driver's "conviction; and being inconsistent with the disposition under Section 3450 necessarily precluded resort to proceedings under the latter section."

In other words, the Court held that the Government can not proceed against the defendant under one statute and against the vehicle under another, and that where there is a conviction of the driver under the National Prohibition Act, Section 26 makes it mandatory upon the Government to proceed against the car under the same Act. According to these decisions, it is conviction of those in charge of the vehicles, not the common element of transportation involved in the two offenses, which prevents election. The cases seem to recognize that

the Government has the right of election, except where there has been a conviction. This situation does not obtain in the present cases. While there were arrests and seizures under the Prohibition Act, there was no prosecution or conviction. See *United States* v. *Commercial Credit Co.* (C. C. A. 4th), 20 F. (2d) 519, 520. There was no attempt here by the District Attorney to proceed criminally under one statute and to seek a forfeiture under another. Both the criminal and forfeiture proceedings were instituted under the revenue laws. It would seem that in a case like those at bar, where are present all the elements of violation of Sections 3296 and 3450, namely, removal, deposit and concealment of tax-unpaid distilled spirits with intent to defraud, the mere fact that the element of removal is of such a character that it could be called transportation should not deprive the Government of the right to enforce its laws as declared in those sections. Under petitioners' theory, if the Government apprehends persons in the act of removing and concealing tax-unpaid distilled spirits by means of an automobile with intent to defraud, then the mere fact that the instrumentality of removal and concealment was in motion at the time it was apprehended would force the Government to abandon the enforcement of the revenue laws, and to proceed against the persons and the car under the National Prohibition Act or let them go free. Thus, a certain law of the United States describing

one offense, and which this Court has said is in force and effect, could not be enforced when there is another law describing a different offense and which is also in effect, merely because one of the elements of the latter law, namely, transportation—which, under petitioners' theory, must not be called removal—appears among the several elements constituting a violation of the former law. It is not believed that Congress could have had any such intention. The element of removal could be entirely eliminated and there would still be left the elements of deposit and concealment which would be sufficient to convict and to forfeit the vehicle. It does not, therefore, seem reasonable to say that because this element is present in a case there can be no complete forfeiture of the car under Section 3450 because, as petitioners, in effect, contend, removal is in fact not removal under that section, but is transportation under Section 26.

Petitioners rely strongly on the fact that the language of Section 26 is mandatory, in that it says that the officer *shall* take possession of the vehicle and proceed against it as therein provided. We submit that the language of Section 26 should be construed in the light of the facts in each case. Manifestly, if there is a violation of Section 26 and of no other law, the Prohibition Act would exclusively apply and the automobile would have to be disposed of as therein provided. But it is pressing the point too far to say that in every case of

possession and transportation Congress intended that other applicable laws of the United States should be suspended and become inoperative.

In *Railroad Company* v. *Hecht*, 95 U. S. 168, it was said that as against the Government the word "shall" is to be construed as "may," unless a contrary intention is manifested. In law "shall" or "may" are often convertible terms. *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100, 103. In *Boyer* v. *Onion*, 108 Ill. App. 612, it was pointed out that the intention of the statute under consideration controls and that when the spirit and purpose of the Act require the word "shall" to be construed as merely giving permission it will be so construed. In *Fields* v. *United States*, 27 App. D. C. 433, 440. it is said:

> Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed.

In *Fleischmann Co.* v. *United States*, 270 U. S. 349, it is said (p. 360):

> The strict letter of an act must, however, yield to its evident spirit and purpose, when this is necessary to give effect to the intent of Congress. * * * And unjust or absurd consequences are, if possible, to be avoided.

See also *Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *Kirby*, 7 Wall. 482, 486; *United States* v. *Katz*, 271 U. S. 354, 357.

It will be noted that the language of Section 3450 is no less mandatory than the language of Section 26 with reference to the disposition of vehicles. It provides that all vehicles and other things "used in the removal or for the deposit or concealment thereof, respectively, *shall be forfeited.*"

The construction of Section 26 as compulsory and exclusive in all cases where transportation is involved will produce consequences which could hardly have been intended. For example, if the driver of a vehicle used to transport liquor escapes, or if witnesses die or fail to identify him, no forfeiture of the car can be had, because under Section 26 the individual must first be convicted. Section 3450 or any other statute under which the vehicle might be forfeited can not be invoked. If a vehicle is used to conceal liquor on which the tax is unpaid, complete forfeiture may be had; but if to the offense of tax evasion is added the offense of transportation without a permit, a less severe forfeiture results. Where a vehicle is used to smuggle intoxicating liquor, and is seized while transporting such liquor across an international border, it may be forfeited only under Section 26, although the offense of smuggling, entailing a complete forfeiture under Sections 3061 and 3062, Revised Statutes (U. S. C., Title 19, Secs. 481–483), has been simultaneously committed. Again, if a vehicle car-

ries both liquor and smuggled merchandise, it is used in transporting liquor in violation of the National Prohibition Act and in smuggling merchandise, and yet Section 26 must be resorted to rather than the statutes incurring a greater forfeiture. So, a vehicle seized while being used in smuggling narcotics or diamonds may be completely forfeited, but if used in smuggling liquor so that transportation results, innocent interests must be protected. In short, where a vehicle or vessel is used in the illegal transportation of liquor, the Government is precluded from securing a forfeiture not only under Section 3450 for tax evasion, but under any other statute imposing a forfeiture for some other simultaneous offense, such as under the customs or navigation laws, where the interests of innocent owners are not saved. If a vessel proceeds on a foreign voyage without giving up her enrollment and license and being duly registered she is subject to complete forfeiture under Section 4337, Revised Statutes (U. S. C., Title 46, Sec. 278), but if she is discovered proceeding with a cargo of liquor so that transportation results innocent interests must be saved. So, a vessel employed in a trade other than that for which she is licensed is subject to complete forfeiture under the navigation laws (Sec. 4377, R. S., U. S. C., Title 46, Sec. 325), but if, while so employed, she is apprehended transporting liquor forfeiture can be had only under Section 26. The same result would flow from Sec-

tions 585 and 586 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 980 (U. S. C., Title 19, Secs. 487, 488), dealing with the improper entry and departure and the unlawful lading of vessels. Other illustrations might be given to show consequences which Congress could not have intended, but which would follow from reading the word "shall" as used in Section 26 to require that forfeiture proceedings must be had thereunder, if at all, where illegal transportation occurs. It does not seem necessary to give Section 26 that interpretation.

Some of these statutes have been in force and effect many years. While originally enacted for a different purpose, they may be effectively employed in the suppression of the liquor traffic, and it is not believed that Congress intended by the adoption of Section 26 to deprive the Government of their full penalty provisions. On the contrary, Section 5 of the Willis-Campbell Act and Section 35 of the National Prohibition Act (U. S. C., Title 27, Sec. 52) would indicate that Congress intended that these statutes should continue in force, if they had been repealed, and be construed as supplementing the National Prohibition Act so as to afford the Government an additional remedy in prohibition enforcement matters.

If Section 26 is not construed as compulsory and therefore exclusive, the argument that a conflict exists loses its force. One statute providing that the United States *may* forfeit guilty interests in a

vehicle for its use in violation of the National Prohibition Act, and another statute that the United States may forfeit all interests in the vehicle, if used to evade the revenue, customs or navigation laws are not in conflict. See *Distilled Spirits*, 11 Wall. 356, 365; *United States* v. *Turner*, 266 Fed. 248; *United States* v. *One Ford Automobile*, 292 Fed. 207, 210; *United States* v. *One Bay State Roadster*, 2 F. (2d) 616, 622; *United States* v. *One Ford Coupe*, 3 F. (2d) 64, 66.

II

THE UNITED STATES ATTORNEY SHOULD HAVE THE RIGHT OF ELECTION AS TO THE STATUTE UNDER WHICH HE WILL PROCEED, WITHOUT REGARD TO THE ACTION OF ARRESTING OFFICERS

If by reason of the language used, proceedings under Section 26 are held to be mandatory and exclusive in all transportation cases, there is of course no election, but if there is a right of election, it should rest with the United States Attorney, as held by the courts below, and he should not be bound by the action of the arresting officers.

Notwithstanding that Section 26 provides that the arresting officer shall proceed thereunder against the offender and the vehicle, it would seem that this provision should be construed with relation to the duties generally of the United States Attorney. It is his duty to enforce all the criminal laws (Section 771, R. S.; U. S. C., Title 28, Sec. 485), and where there are two criminal statutes

apparently violated at the same time or by substantially the same Act, he must determine whether he will prosecute under either or both, and that determination must be based largely on his judgment as to the probable results of the prosecution. As said in *United States* v. *Commercial Credit Co.* (C. C. A., 4th), 20 F. (2d) 519, 521, the United States Attorney is the law officer authorized to speak in behalf of the Government. It would greatly hamper him in the performance of his duties to be bound by the conclusions of prohibition agents and United States commissioners. Regardless of the seizures made and warrants issued, he must determine from the facts before him what he can prove before a court and jury, and his action should be in accordance with that determination. A seizure may be made and a warrant issued under the National Prohibition Act. It may develop that the parties charged are not guilty under that Act, but are guilty under some other law incurring a forfeiture. If the United States Attorney is bound by the action taken he is precluded from proceeding with a proper prosecution, and the guilty parties will escape because of the mistakes of the arresting officer and the commissioner. Again, an act may constitute a violation of both the revenue laws and the National Prohibition Act and an arrest and seizure may be made under the latter law. Because of the escape or death of the guilty party a conviction can not be obtained, yet the United States Attorney can not proceed with the forfeiture under

the revenue laws because the arrest and seizure were made under the National Prohibition Act. In answer to questions arising under such illustrations, the Circuit Court of Appeals for the Fourth Circuit said in *United States* v. *Commercial Credit Co., supra* (p. 521):

> To ask these questions is to answer them; and to our minds they demonstrate the unsoundness of the suggestion that, by action of a prohibition agent or a United States commissioner, the government is to be held to have made an election of remedies, and is to be precluded from prosecuting crimes denounced by its laws or forfeitures incurred thereunder. The fact that the statute directs that, upon an arrest and seizure under the Prohibition Act, the officer of the law shall proceed against the person arrested, in a court of competent jurisdiction, manifestly was not intended to preclude a prosecution for other crimes of which the person arrested might be guilty, or to make such action by the officer an election by the government to proceed under the Prohibition Act instead of under the internal revenue laws, if the act of which accused was guilty constituted a violation of both.

Experience may demonstrate to the United States Attorney that a conviction could not be obtained on the evidence presented to him by a prohibition agent or other arresting officer. If the United States Attorney may otherwise properly proceed under either Section 26 or Section 3450, we submit

that the mere fact that Section 26 provides that the arresting officer "shall at once proceed against the person arrested under the provisions of this title" does not make it the duty of the United States Attorney to proceed under Section 26 exclusively. The matter can proceed only through the United States Attorney and when the arresting officer has brought the facts to that officer the latter must determine the course that shall thereafter be pursued.

The facts in the cases at bar disclosed a violation of the internal revenue laws providing for a fine, penalty and forfeiture. In this connection Section 838, Revised Statutes (U. S. C., Title 28, Sec. 486), provides:

> It shall be the duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings can not probably be sustained, or that the ends of public justice do not require that such proceedings shall be instituted; in which case he shall report the facts in customs cases to the Secretary of the

Treasury, and in internal revenue cases to the Commissioner of Internal Revenue for their direction.

It was as much the duty of the United States Attorneys when these cases were reported to them to proceed under this law as under the National Prohibition Act. They had to determine the proper course to be pursued. See *Confiscation Cases,* 7 Wall. 454, 457; *The Jugoslavia,* 21 F. (2d) 99, 101; *United States* v. *Woody,* 2 F. (2d) 262.

It is settled that the United States Attorney has no right of election as to the disposition of the vehicle after there has been a conviction for transportation or for possession incidental to transportation. At what stage of the proceedings short of conviction he may elect under which statute he will proceed has not been definitely decided. In the *Port Gardner case, supra,* this Court found it unnecessary to determine whether the mere commencement of a proceeding under Section 26 constitutes an election, but a prosecution resulting in a plea of guilty was construed as a "prosecution with effect" and as resulting in an election. In *Commercial Credit Corporation* v. *United States* (C. C. A., 2d), 18 F. (2d) 927, it was held that the filing of an information constituted an election. Under Section 26 it is the conviction of the person arrested that determines the disposition of the vehicle. Likewise, Section 5 of the Willis-Campbell Act takes no account of the mere commencement of a

proceeding, but provides that, as to offenses which constitute a violation of the liquor laws in force before the National Prohibition Act as well as of that Act or the Willis-Campbell Act, only a conviction under one statute shall bar a prosecution under the other.

CONCLUSION

It is respectfully submitted that the proceedings had in these cases were proper, that the cases were correctly decided, and that the judgments and decrees of the courts below should be affirmed.

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APRIL, 1930.

APPENDIX

For the convenience of the Court the following statutes are set forth below:

Section 26, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or aircraft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to re-

turn said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or aircraft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of

seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Sec. 35, p. 317 (U. S. C., Title 27, Sec. 52):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

* * * * *

Section 5 of the Supplemental Act of November 23, 1921, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3):

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

Sec. 771, Revised Statutes (U. S. C., Title 28, Sec. 485):

> It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

Section 3450, Revised Statutes (U. S. C., Title 26, Sec. 1181):

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any en-

gine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

U. S. GOVERNMENT PRINTING OFFICE: 1946